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No. 80-2205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED*

Whether absolute judicial immunity shields the Clerk of the Circuit Court of Cook County from liability under 42 U.S.C. §1983 for the damages resulting from his failure to fulfill his duty of causing the court order recalling respondent's arrest warrant to be transmitted to the police.

*Petitioner's Brief substantially changes the substance of the Question Presented as stated in his Petition for Certiorari. By now portraying the issue before this Court as that of whether petitioner should be absolutely immune "when performing judicial or quasi-judicial functions," petitioner would have his immunity depend upon how he labels his duties, rather than, as respondent believes appropriate, upon the functional character of his allegedly unconstitutional conduct.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Why the judge's order recalling respondent's arrest warrant was not delivered to the police department is a

mystery. Petitioner's assertion that his deputy clerks "unquestionably followed" three of the four procedures for handling warrant recall orders, Pet. Br. 7, does not help solve the mystery since their evident failure to accomplish the "fourth procedure" for sorting and delivering the orders rendered their obedience to petitioner's other procedures futile.

Nothing in the record supports petitioner's surmise that respondent's recall order was either "lost in the mail or. . . was inadvertently lost somewhere between the courtroom and petitioner's office." Pet. Br. 7. Petitioner's affidavits show neither what happened to respondent's recall order after a deputy clerk placed it in an "out basket" nor what procedures were generally followed for sorting and delivering such orders. The evidence, therefore, may show that the police never received respondent's recall order as much because of the "mail" or inadvertence as because of the haphazard nature of petitioner's procedures for sorting and delivering such orders.

Petitioner's argument that the failure to communicate respondent's "single warrant recall order to the police" evidences only "one inadvertent mistake" and does not justify respondent's allegations of a custom or policy of such mistakes, Pet. Br. 11, 30-31, is similarly unsupported by the record. The extent to which petitioner's procedures for handling warrant recall orders were responsibile for the Police Department's failure to receive either respondent's recall order or any of the "thousands of other warrant recall orders issued by the Circuit Court and implemented by petitioner's deputy clerks," Pet. Br. 15, must await factual clarification.

Finally, the inference petitioner would draw as to the efficacy of his general procedures for handling warrant recall

orders is unjustified not only because it is unsupported by the record and impermissably indulges factual inferences in favor of the party moving for summary judgment, *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 158-59 (1970), but also because it is irrelevant to the Question Presented of whether petitioner is entitled to absolute immunity from damages. If an official is granted absolute immunity, he is afforded such protection notwithstanding this Court's assumption that he committed the constitutional violation alleged. *See infra* Part V, pp. 51-52.

SUMMARY OF ARGUMENT

Petitioner has not met his burden of demonstrating any of the grounds necessary to establish his entitlement to immunity. First, he has not shown that he needs absolute immunity in order to perform the official functions here at issue. Without further factual clarification it cannot be determined which of the various functions he may have performed in regard to the recall of arrest warrants actually caused respondent's unconstitutional arrest. The various duties of his office that petitioner does claim to have performed, however, all involve activities of a ministerial or administrative nature, which have heretofore been accorded either no immunity or, at most, a qualified immunity.

Second, petitioner has not established that court clerks were entitled to a common law immunity in 1871 equivalent to that which he now claims under § 1983. It was then firmly established that court clerks had no immunity for their negligent or wilful failure to perform ministerial duties, even when those duties required the exercise of wide discretion.

Finally, petitioner has not met his burden of establishing that any degree of immunity is so essential to the per-

formance of court clerks' duties that Congress cannot be presumed to have intended that the general language of § 1983 override that immunity. To the extent that petitioner may be found liable for the failure to perform ministerial duties, he would deserve no immunity whatever since the only purpose of an immunity of any kind is to protect officials' ability to exercise their discretion in the public interest.

Even if petitioner exercised substantial discretion, however, he is not entitled to an absolute immunity. Petitioner has presented no evidence to support his implausible contention that absolute immunity is essential to the performance of his duties. Petitioner's duties, as well as the administrative and ministerial duties of court clerks generally, are also not functionally comparable to the adjudicative duties of judges and judge-like officials, who are the actors in the judicial process who have heretofore had the exclusive protection of absolute immunity from damages. Furthermore, court clerks who violate constitutional rights by failing to perform their administrative or ministerial duties are not subject to the procedural safeguards inherent in judicial-type processes. The presence of such safeguards has always been a prerequisite for the grant of absolute immunity since without them individuals would have no protection from officials who have no compunction about violating constitutional rights.

ARGUMENT

I.

PETITIONER HAS NOT MET HIS BURDEN OF DEMONSTRATING THAT

HE HAS PERFORMED ANY FUNCTIONS REQUIRING THE PROTECTION OF ABSOLUTE IMMUNITY.

Petitioner maintains that he is entitled to immunity because he is an officer of the court and an essential aide to the judge. Pet. Br. 14-16. An official's entitlement to immunity, however, has always depended upon the nature of his duties, not upon his title or location in the government. *Butz v. Economou,* 438 U.S. 478, 506 (1978); *Stump v. Sparkman,* 435 U.S. 349, 361-62 (1978); *Imbler v. Pachtman,* 424 U.S. 409, 430-31 (1976); *Scheuer v. Rhodes,* 416 U.S. 232, 247 (1974) (quoting *Barr v. Matteo,* 360 U.S. 564, 573-74 (1959)); *Ex Parte Virginia,* 100 U.S. 339, 348 (1879); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170-71 (1803). Petitioner's central argument, therefore, stands on the same footing as the often rejected argument that congressional aides, officers, and functionaries should be immune because they play an essential role in the conduct of legislative duties. *Doe v. McMillan,* 412 U.S. U.S. 306, 315-17 (1973); *Gravel v. United States,* 408 U.S. 606, 618 (1972); *Powell v. McCormack,* 395 U.S. 486, 504 (1969); *Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967); *Kilbourn v. Thompson,* 103 U.S. 168 (1881). The issue in this case is thus not whether court clerks are important, but whether the nature of their activities requires an inference that Congress intended them to be protected from suit under 42 U.S.C. §1983 (hereafter §1983).

It is petitioner's burden to establish his entitlement to immunity from damages under §1983. *Dennis v. Sparks,* 449 U.S. 24, 29 (1980); *Butz v. Economou,* 438 U.S. 478, 506 (1978). To satisfy that burden he must demonstrate first, that court clerks had an equivalent common law

immunity when the predecessor of §1983 was enacted; second, that court clerks generally perform the types of functions that require the protection of immunity; and third, that petitioner in fact performed such functions. Sections II and III below, pp. 10-39, address petitioner's failure to demonstrate the first two propositions, while this section addresses his failure to demonstrate the third proposition.

Petitioner maintains that he acted here as an aide to the presiding judge in the exercise of that judge's general administrative authority.[1] Pet. Br. 15. As shown in Section III, *infra* at 23-49, acts of an official that are of an executive, administrative, or ministerial nature have been held to deserve no immunity or, at most, a qualified immunity.[2] Petitioner cannot demonstrate that he deserves any higher protection because the record does not reveal what he did here that might warrant such protection. Depending on facts

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[1]Illinois Supreme Court Rule 21(b) provides: "The chief judge of each circuit may enter general orders in the exercise of his general administrative authority. . . ." Article 6, §7 of the Illinois Constitution provides, *inter alia:* "Subject to the authority of the Supreme Court, the Chief Judge [in each circuit] shall have general administrative authority over his court. . . ." Petitioner maintains that his actions in this case were pursuant to a General Order of the Presiding Judge of the First Municipal District of the Circuit Court of Cook County that established procedures for warrant recall requests. Pet. Br. 15.

[2]See regarding a qualified immunity: *Butz v. Economou,* 438 U.S. 478 (1978) (federal executive officials as a general matter); *Procunier v. Navarette,* 434 U.S. 555 (1978) (prison administrators); *O'Connor v. Donaldson,* 422 U.S. 563 (1975) (state hospital administrator); *Wood v. Strickland,* 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (state Governor and various state executive officials); *Pierson v. Ray,* 386 U.S. 547 (1967) (policemen). See regarding no immunity: *McCray v. Maryland,* 456 F.2d 1, 5 (4th Cir. 1972); *Murray v. City of Chicago,* 634 F.2d 365, 367-68 (7th Cir. 1980) (Swygert, J. concurring) (Pet. Cert. App.A at 6a-7a).

not yet adduced, petitioner's liability may be based alternatively upon his deputies' failure to transmit to the police the judge's order recalling respondent's arrest warrant,[3] upon his own failure to implement the procedures

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[3]Illinois Rev. Stat. ch. 25, § 10 (1979) provides: "The principal clerk shall, in all cases, be responsible for the acts of his deputies." This statute has been interpreted to make "the clerk civilly responsible for the acts of his deputies. . . ." *People v. Gill*, 30 Ill. App.2d 32, 51, 173 N.E.2d 568, 577 (1961). This Court has not ruled on the question of whether a state law making a superior official liable for the actions of his subordinates is sufficient to establish the superior's liability in a § 1983 action where the superior did not personally participate in his subordinates' unconstitutional conduct. The language of 42 U.S.C. § 1988, however, and the interpretation this Court has given that language in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969), would indicate that the Illinois rule authorizing a damage remedy against petitioner for his deputies' unlawful acts should be utilized under § 1983, since it is the rule on damages that "better serves the policies expressed in the fedeal statutes." *Id.* Support for this conclusion is found in this Court's implicit approval of two circuit court decisions that held sheriffs liable under § 1983 for their deputies' wrongful acts on the theory that § 1988 authorized incorporating in the remedies available under § 1983 the state law making superiors liable for subordinates' misconduct. *Moor v. County of Alameda*, 411 U.S. 693, 704 n.17 (1973), *citing Hesselgesser v. Reilly*, 440 F.2d 901, 903 (9th Cir. 1971); *Lewis v. Brautigam*, 227 F.2d 124, 128 (5th Cir. 1955). *See also McDaniel v. Carroll*, 457 F.2d 968, 969 (6th Cir. 1972), *cert. denied*, 409 U.S. 1106 (1973); *Carter v. Carlson*, 447 F.2d 358, 368-70 (D.C. Cir. 1971), *rev'd on other grounds sub nom District of Columbia v. Carter*, 409 U.S. 418 (1973). *But see Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 1979) and *id.*, at 1211-15 (Rubin, J., concurring in part and dissenting in part). In addition, since the Complaint alleges that petitioner himself did not fulfill his duty to communicate respondent's arrest warrant recall order to the police, Complaint, para. 16, J.A. 8, it is not beyond doubt that respondent might prove facts showing that petitioner was personally involved in the events that resulted in the failure to communicate said warrant to the police. The affidavits filed in support of petitioner's summary judgment motion did not disclaim such personal involvement. *See Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 158-59 (1970).

required by the court or other higher authority for transmittal of such orders,[4] or upon his failure to devise procedures that were suitable for assuring transmittal of the orders.

Petitioner's own immunity argument, moreover, demonstrates the lack of a sufficient factual basis for his asserted need for absolute immunity. On the one hand, petitioner maintains that his immunity is founded upon the protection from suit historically accorded clerks who perform purely ministerial acts ordered by the court, Pet. Br. 20-22, while on the other hand, he makes the inconsistent argument that immunity is needed to promote his exercise of discretion in devising procedures that are best suited for the notification of warrant recall orders. *Id.* at 30. As noted more fully below, pp. 24-27, the nature and scope of the discretion required in the performance of an official's duty is critical to the determination of what degree of immunity, if any, should be accorded. *Scheuer v. Rhodes,* 416 U.S. 232, 246-47 (1974). *See McCray v. Maryland,* 456 F.2d 1, 3-4 (4th Cir. 1972); *Raitport v. Provident National Bank,* 451 F. Supp. 522, 536 (E.D. Pa. 1978). Here it is impossible to determine where on the ministerial-discretionary continuum of conduct petitioner's alleged unconstitutional actions lie since petitioner has not offered even a hypothesis, much less any evidence, as to who is "at fault for failing to establish or execute appropriate procedures for preventing such serious

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[4]Petitioner points out that the procedures required for the recall of arrest warrants were established both by a general administrative order of the court and by a joint committee of officials from various governmental agencies. Pet. Br. 15. Whether petitioner failed to implement these required procedures and thereby prevented the order recalling respondent's arrest warrant from being transmitted to the police is yet to be determined.

malfunctionings in the administration of justice."[5] *Murray v. City of Chicago*, 634 F.2d 365, 366 (7th Cir. 1980) (Pet. Cert. at 3a-4a).

Although there is thus doubt as to the nature of petitioner's responsibility for respondent's constitutional deprivation, there is no doubt that his actions were administrative or ministerial in character. Since petitioner has proferred no reason why he should be excepted from this Court's consistent holdings denying absolute immunity to other officials who also perform important administrative or ministerial functions, petitioner has failed to meet his burden of establishing his entitlement to absolute immunity. This case need not be decided, however, merely on the ground of petitioner's failure to meet his burden, for an examination of congressional intent and the policies underlying both § 1983 and the immunity doctrine will show not only that a general

[5]Questions unanswered by petitioner that are critical to the determination of his responsibility for respondent's constitutional deprivation include the following: Was there any system for confirming the receipt of arrest warrant recall orders by the police? What reporting system, if any, did petitioner have for determining whether people were being arrested on the basis of recalled warrants? How were recall orders sorted for delivery and actually delivered to the police? If, for example, petitioner had not instituted a system for checking on the receipt of recall orders by the police, despite his knowledge that people were frequently arrested on the basis of warrants recalled months earlier, petitioner's responsibility for respondent's unconstitutional arrest would be established. If the absence of such a system were due to petitioner's failure to implement established procedures required by the joint committee, see *supra* p. 7 at note 3, petitioner's actionable conduct would appropriately be deemed ministerial and therefore entitled to no immunity. *See infra* pp. 24-28. If, however, the absence of such a system were due to petitioner's failure to devise appropriate checking methods in response to the manifest need for additional safeguards, petitioner's actionable conduct may be deemed discretionary, in which case he might be entitled to assert a qualified immunity. ***But see infra*** p. 29 at note 15.

rule of absolute immunity is wholly unwarranted for court clerks, but that qualified immunity is also inappropriate where court clerks violate their ministerial duties.

II.

THE CONGRESSIONAL INTENT IN ENACTING §1983 AS CONSTRUED IN LIGHT OF THE COMMON LAW IN 1871 FORECLOSES PETITIONER'S CLAIM TO ANY IMMUNITY.

A. Petitioner Can Demonstrate His Entitlement To An Immunity Of Any Kind Only By Showing That Such Immunity Both Had A Common Law Equivalent In 1871 And Is Consistent With Congress' Purposes In Enacting §1983.

The question of whether an official is entitled to immunity from damages under §1983 is "essentially one of statutory construction." *Owen v. City of Independence,* 445 U.S. 622, 635 (1980). Since neither §1983's general language nor the congressional debates[6] spell out the limits of §1983,

[6]However, as this Court noted in *Owen v. City of Independence,* 445 U.S. 622, 635-36 (1980), the Congressional debates do "confirm the expansive sweep of the statutory language." The grant of an immunity that is not strictly required by a clear showing of congressional intent could be reconciled neither with Representative Shellabarger's remarks quoted in *Owen* that the Act is to be construed with "the largest latitude consistent with the words employed," 445 U.S. at 636, nor with this Court's recent finding that "[a]s remedial legislation, §1983 is to be construed generously to further its primary purpose." *Gomez v. Toledo,* 446 U.S. 635, 639 (1980). A grant of immunity to court clerks would,

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Tenney v. Brandhove, 341 U.S. 367, 376 (1951), the Court has inferred Congress' intent on the question of official immunity from both the common law background in 1871 and Congress' purposes in enacting the statute. *Gomez v. Toledo*, 446 U.S. 635, 639 (1980).

In order to justify the grant of immunity under § 1983 this Court has required that two conditions be met: the common law equivalent to the immunity must have been well-established when § 1983 was enacted, *Owen v. City of Independence*, 445 U.S. at 637, and the policies served by the common law immunity must be compatible with the 1871 Congress' purpose of exposing state and local officials to a new form of liability. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. _____, _____, 101 S. Ct. 2748, 2755 (1981). Petitioner agrees that his immunity must be determined by reference to the immunity that was accorded court clerks at common law prior to 1871. Pet. Br. 16-17. Petitioner, however, utterly confuses the common law rules of official liability in the nineteenth century, turning upside down the clear holdings of courts that invariably refused to accord any immunity to court clerks sued for their failure to perform their ministerial duties.

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moreover, be particularly difficult to reconcile with the concern expressed by many supporters of the bill that state court officials were a primary source of the violations of citizen's rights. *See* Cong. Globe, 42d Cong., 1st Sess. 394 (1871) (remarks of Rep. Rainey); *id.* at 653 (remarks of Sen. Osborn); *id.*, App. at 185-86 (remarks of Rep. Platt). As this Court recognized in *Mitchum v. Foster*, 407 U.S. 225, 240 (1972), one of the major purposes of the Act was to provide a federal remedy for the violations of freedmen's and their sympathizers' constitutional rights by state court officials.

B. Under The Unanimously Held Common Law Rule In 1871 Court Clerks Were Liable In Damages For Their Failure To Perform Ministerial Duties.

In 1870 this Court recognized that officials had no immunity whatever for their violation of ministerial duties:

> [T]he rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender.

Amy v. The Supervisors, 78 U.S. 136, 138 (1870). *See also* 2 C. Addison, *A Treatise on the Law of Torts* 111 (1881); T. Cooley, *A Treatise on the Law of Torts* 379-83 (1880); 2 T. Sedgwick, *A Treatise on the Measure of Damages* 443-45 (7th ed. 1880). Clerks of courts were not excepted from this rule of liability, which was succintly summarized in 11 C.J. *Clerks of Courts* §86 (1917):

> Where a clerk of court fails or refuses to perform, or is negligent in the performance of, a duty imposed on him by law. . .and, if his act was the direct and proximate cause of the resultant injury, without contributory negligence on the part of the party complaining, the clerk is liable in damages therefor both personally and on his official bond.

(Footnotes omitted.) Eighty-one cases are cited in support of this statement of the general rule. *See id.* at 892 n.97.[7]

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[7]The rule that clerks of courts were liable for negligently performing ministerial acts originated in England as early as 1583. *See French v. Couch,* 21 Eng. Rep. 100 (Ch. 1583) (clerk of court liable in damages for serving the wrong subpoena); *Douglass v. Yallop,* 97 Eng. Rep. 532

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Petitioner's alleged unconstitutional acts fall clearly within the common law rule of official liability for the nonperformance or improper performance of ministerial duties. The Illinois Supreme Court has defined a court clerk's duty to be ministerial "when it is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *People v. May*, 251 Ill. 54, 57, 95 N.E. 999, 1000 (1911). *Accord, Grider v. Talley*, 77 Ala. 422, 425 (1884); *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 173-74 (1861); *Morton, Bliss & Co. v. Comptroller General*, 4 S.C. 430, 474-74 (1873). The acts of court clerks were generally recognized in the nineteenth century as being of this ministerial character. *See, e.g., Marsh v. Fulton County*, 77 U.S. 676, 682 (1870); *Hughes v. Streeter*, 24 Ill. 647 (1860); *McNutt v. Livingston*, 15 Miss. (7 S. & M.) 641 (1846); *Brock v. Hopkins*, 5 Neb. 231, 235-36 (1876). *See generally* T. Cooley, *A Treatise On The Law Of Torts* 392 (1880).

If factual clarification reveals that petitioner should be deemed responsibile for the actual failure to notify the police of the recall of respondent's arrest warrant, *see supra* p. 7, n. 3, under nineteenth century common law rules he would unquestionably be liable for the failure to perform his ministerial duty. The duty to transmit the judge's recall order is absolute, certain, and imperative, involving merely the execution of the judge's directive. *Cf. People v. May*, 251 Ill.

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(K.B. 1759) (clerk of court liable for failing to enter a judgment on the roll). *See also Wildes v. Morris*, [1853] 22 L.J.M.C. (n.s.) 4 (1852); *Robinson v. Gell*, 138 Eng. Rep. 857 (C.P. 1852); *Whitelegg v. Richards*, 107 Eng. Rep. 300 (K.B. 1823). American courts continued to follow the common law rule after independence, *See, e.g., Russell v. Clayton*, 7 Va. (3 Call) 42 (1801).

54, 57, 95 N.E. 999, 1000 (1911) (clerk's determination of resident status of surety is ministerial).

Similarly, if petitioner's responsibility is found to have resulted from his failure to implement specific arrest warrant recall procedures established by order of the court, he would also have been liable at common law on the basis of his nonperformance of a ministerial duty. Since petitioner had no discretion allowing him to decide not to implement such procedures, Pet. Br. 15, his duty would require only the execution of the judge's directive and therefore would be classified as purely ministerial. *People v. May,* 251 Ill. at 57, 95 N.E. at 1000.

The common law would have conferred no immunity on petitioner, moreover, even if he had exercised wide discretion in implementing or formulating the procedures for notifying the police of arrest warrant recall orders. Where an official was legally required to accomplish a clear and definite duty, his necessary exercise of discretion in determining and implementing the methods for achieving the mandated objective did not relieve him from liability for failing to fulfill that duty. Thus, in *Hicks v. Dorn,* 42 N.Y. 47 (1870), the court rejected the contention of the defendant Superintendent of Canal Repairs that he should be immune from having to answer in damages for his destruction of plaintiff's boat because he was required to exercise a judicial-type discretion in deciding how best to fulfill his duty of ensuring continued canal navigation:

> The law made it [defendant's] duty to put his canal in repair. . .and it was not left to his discretion to determine whether he would discharge that duty or not. . . . It is true that [defendant] was bound to exercise his discretion as to the methods and instrumentalities to be employed. . . yet it has never been held that, merely because ministerial officers have a discretion to exercise, that gives them the immunity of judicial officers.

Id. at 52-53.

Court officials acting pursuant to court order were not excepted from this general rule of liability for officers whose exercise of discretion resulted in the failure to accomplish ministerial duties. In *Buck v. Colbath,* 70 U.S. (3 Wall.) 334 (1865), this Court pointed out, in determining the liability of a court officer who executes a writ directing him to levy upon unspecified property, that such "officer has a very large and important field for the exercise of his judgment and discretion. . .and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice." *Id.* at 344.

In explaining the reason for the liability of an official such as the one described in *Buck v. Colbath,* the court in *McCord v. High,* 24 Iowa 336 (1868), pointed out that the official's liability depends not on whether he must exercise discretion in determining how to accomplish the court's order, but rather, on the absence of any discretion in deciding whether to accomplish that order:

> In the performance of these [acts unspecified by the law or the writ], he exercises discretion and judgment, and is liable for errors and mistakes that may result in loss to others, though they were the result of the deliberate exercise, in good faith, of such discretion and judgment. In short, he has no discretion, and can exercise no judgment, in regard to the end to be attained by his discharge of duty; as to the means and manner of accomplishing the end, he, of necessity, must be more or less free to choose, for it is impossible for the law to provide rules adapted to the infinite variety of human actions and attendant circumstances that may be met by its ministers.

Id. at 344.

The type of discretion exercised by the officials in *Buck* and *McCord* is indistinguishable in nature from even the

broadest discretion putatively exercised by petitioner in devising or implementing the court-ordered procedures for the transmittal of arrest warrant recall orders to the police. Under the common law in 1871, as exemplified in these cases, petitioner's exercise of discretion in determining the best means and manner of accomplishing the transmittal of a warrant recall order would have entitled him to no immunity of any kind.

As *Owen v. City of Independence*, 445 U.S. 622 (1980), has made clear, this nineteenth century rule denying any immunity to officials whose exercise of discretion results in their failure to fulfill ministerial duties directly bears upon the present determination of immunity under § 1983. This Court found in *Owen* that the general nineteenth century common law immunity for municipalities' conduct of governmental functions did not warrant granting *any* immunity to municipalities under § 1983 because, *inter alia*:

> [w]hile the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment.

Owen v. City of Independence, 445 U.S. 622, 649 (1980). *See also id.* at 679-80 n.19 (Powell, J. dissenting). Thus, if, as *Owen* found, municipalities have no valid claim to immunity in § 1983 actions because the common law in the nineteenth century denied them any immunity for their exercise of discretion in executing policy, ministerial officials must also be denied immunity in § 1983 actions. The common law gave them no more immunity for their exercise of discretion in executing ministerial duties than it gave municipalities for their exercise of discretion in executing governmental policies.

Under these common law principles, petitioner would be immune here only if he had discretion to decide *ab initio* whether to carry out the presiding judge's general order requiring warrant recall orders to be transmitted to the police. Under petitioner's own submission, however, not only was it his duty to implement such order, but the methods and procedures for carrying out that order had been devised by a joint committee of local governmental officials, which included a representative of his office. Pet. Br. 15. Therefore, regardless of the degree of discretion petitioner may have exercised in determining the manner in which warrant recall procedures should be implemented, under uniformly held nineteenth century common law principles his exercise of that discretion would not confer him with any immunity from damages for his improper failure to assure that such procedures were adequate to accomplish the actual transmittal of warrant recall orders to the police.[8]

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[8]Petitioner does not contend that he would have been immune under nineteenth century common law rules because of the arguably discretionary nature of his conduct. It may be noted nevertheless that the nineteenth century Supreme Court cases that did find executive officials immune because of the discretionary nature of their decision-making did so because the statutes under which these officials were authorized to act explicitly or impliedly committed such decision-making to their discretion, thereby affording them the defense of legal justification. *See, e.g., Otis v. Walter,* 15 U.S. 7, 8, 2 Wheat 18, 21 (1817); *Martin v. Mott,* 25 U.S. 10, 13-14, 12 Wheat. 19, 31-32 (1827), *Kendall v. Stokes,* 44 U.S. 296, 3 How. 87 (1844). An officer who did not exercise his discretion in good faith, however, could not take advantage of this defense. *Wilkes v. Dinsman,* 48 U.S. 55, 65, 7 How. 89, 130-31 (1849) ("[T]he officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression. . . .").

C. Petitioner's Claim That Court Clerks Under Nineteenth Century Common Law Principles Had Absolute Immunity From Damages Has No Support In The Case Law.

All of petitioner's arguments for absolute immunity under nineteenth century common law rules are in utter contradiction to those rules. First, petitioner maintains that in performing acts pursuant to court order the clerk would have judicial immunity in the same fashion as would the judge. Pet. Br. 22. This argument, however, has no application here since respondent has alleged that petitioner acted contrary to court orders both to recall the warrant for respondent's arrest and to implement adequate procedures to assure that such recall orders are transmitted to the police. Court officials who failed in a similar fashion to carry out judicial orders had no immunity under nineteenth century common law rules. *Governor v. Dodd,* 81 Ill. 162 (1976); *State v. Bowen,* 41 Mo. 217 (1867); *State v. Merritt,* 65 N.C. 558 (1871); *The Judges v. Deans,* 9 N.C. 93 (1822).

Petitioner argues nevertheless that a clerk was not liable for the negligent failure to carry out a court order "because the clerk's act was considered the act of the judge who was not amenable to suit at common law." Pet. Br. 10. It is illogical, however, to maintain that a clerk's act should be considered the judge's act when the clerk's only "act" is to violate the judge's mandatory order to perform a certain ministerial duty. Moreover, petitioner is simply incorrect in asserting that judges were not subject to liability in damages for improper performance of a ministerial act. Pet. Br. 10, 22. Thus, in *Ex Parte Virginia,* 100 U.S. 339 (1879), this Court upheld the liability of a state court judge who had excluded Blacks from serving as jurors, noting:

> "Whether the act done by [the defendant judge] was judicial or not is to be determined by its character, and

> not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge.

Id. at 348. *See also Peters v. Land,* 5 Blackf. 12 (Ind. 1838); *Mayberry v. Kelley,* 1 Kans. 116 (1862); *Briggs v. Wardwell,* 10 Mass. 356 (1813); *Tompkins v. Sands,* 8 Wend. 462 (N.Y. Sup. Ct. 1832); *Place v. Taylor,* 22 Ohio St. 317 (1872); *Ferguson v. Earl of Kinnoull,* 8 Eng. Rep. 412 (H.L. 1842); *Daubney v. Cooper,* 109 Eng. Rep. 438 (K.B. 1829). *See generally* T. Weeks, *The Doctrine of Damne Absque Injuria,* 207-11, 219 (1879). Finally, even if petitioner were correct that on the facts of this case it would be possible for him to establish that he was actually carrying out a court order, this assertion would not have established an absolute immunity from suit, but instead would merely have constituted the ground for a defense at common law. *Davidson v. Wiley, Banks & Co.,* 31 Ala. 452 (1858). *See generally* A. Stearns, *The Law of Suretyship* 335-37 (1903).

Petitioner's alternative argument that clerks were not liable at common law for negligent conduct, Pet. Br. 21, is simply contrary to the overwhelming majority of nineteenth century cases, which held that court clerks are liable for negligently performing or failing to perform ministerial duties imposed by statute, common law, or order of court.[9]

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[9] *Collins v. McDaniel & Strong,* 66 Ga. 203 (1880); *Governor v. Dodd,* 81 Ill. 162 (1876); *Hughes v. Streeter,* 24 Ill. 647 (1860); *Governor v. Ridgway,* 12 Ill. 14 (1850); *State v. Ritter,* 20 Ind. 406 (1863); *Haverly & McDonald v. McClelland,* 57 Iowa 182 (1881); *McFarland v. Burton,* 89 Ky. 294, 12 S.W. 336 (1889); *Bank of Kentucky v. Haggin,* 8 Ky. 225, 1 A.K. Marsh. 306 (1818); *Anderson v. Joiiett,* 14 La. Ann. 614 (1859); *Maxwell v. Pike,* 2 Me. 8 (1822); *(continued)*

Petitioner cites *Commonwealth v. Thompson,* 65 Ky. (2 Bush) 559 (1866 for the proposition that "[t]he clerk's negligence. . .was no exception to the clerk's immunity from liabiliy." Pet. Br. 21. This case actually held that where the clerk's action was subsequently approved by the court, his culpability must be greater than mere negligence for there to be a cause of action. 65 Ky. at 560. At most, *Thompson* establishes a qualified immunity for clerks of court who commit merely negligent acts that are later ratified by the judge. Most important, petitioner fails to note that *Thompson* is inconsistent with both preceding and subsequent Kentucky cases that held clerks of courts liable for their negligence. *Samuels v. Brand,* 119 Ky. 13, 82 S.W. 977 (1904); *McFarland v. Burton,* 89 Ky. 294, 12 S.W. 336 (1890); *Commonwealth v. Chambers,* 31 Ky. 8 (1 Dana 11) (1833); *Bank of Kentucky v. Haggin,* 8 Ky. 225, 1 A.K. Marsh. 306 (1818); *Marshall v. Byram,* 4 Ky. (1 Bibb) 341 (1809). *See also Kennedy v. Terrill,* 3 Ky. (1 Hard.) 498 (1808) (justice of the peace may be liable for issuing illegal warrant).

Petitioner also cites *Billings v. Lafferty,* 31 Ill. 318 (1863) to support his claim that a plaintiff must allege that the clerk acted wilfully and maliciously before an action would lie. Pet. Br. 19-20. This is a serious misreading of the holding of

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Rosenthal v. Davenport, 38 Minn. 543, 38 N.W. 618 (1888); *Brown v. Lester,* 21 Miss (13 S. & M.) 392 (1850); *McNutt v. Livingston,* 15 Miss. (7 S. & M.) 641 (1846); *Brock v. Hopkins,* 5 Neb. 231 (1876); *State v. Merritt,* 65 N.C. 558 (1871); *State v. Gaines,* 30 N.C. 168 (1847); *State v. Watson,* 29 N.C. 226, 7 Ired. 289 (1847); *Coltraine v. McCain,* 14 N.C. (3 Dev.) 308 (1832); *Ziegler v. Commonwealth,* 12 Pa. 227 (1849); *Pass v. Dibrell,* 16 Tenn. (8 Yerg.) 470 (1835); *Clark v. Wilcox,* 31 Tex. 322 (1868); *Watts's Heirs v. Robson,* 6 Tex. 206 (1851); *Russell v. Clayton,* 7 Va. (3 Call) 41 (1801).

Billings in which the Illinois Supreme Court simply upheld a complaint that alleged a wrongful and unjust intention to injure the plaintiff. The court was silent on the question of whether a plea of negligence would have been sufficient to uphold the cause of action. That the court would have found such a plea sufficient seems most likely in light of its holding thirteen years later that a clerk of the court was liable for negligently failing to enter a judgment. *Governor v. Dodd,* 81 Ill. 162 (1876).

Finally, petitioner argues that the nineteenth century cases finding clerks liable for the failure to perform ministerial acts are explained by statutes requiring court clerks to have surety bonds, rather than by common law principles of official liability. Pet. Br. 19-20. Contrary to petitioner's contention that "[s]tate courts which found the court clerk liable at common law for failure to perform an act considered ministerial did so because the act was mandated by the bond statute. . .," Pet. Br. 20, an official was not liable on his bond unless he violated one of "the duties of his office" otherwise specified by the law. *See, e.g.,* Ill. Rev. Stat. 1979, ch. 25 §4 (1979), Pet. Br. 19, *Governor v. Ridgway,* 12 Ill. 14, 17 (1850) (". . .it is clear that he [the clerk] is not responsible upon his official bond for failing to do what the law did not require.").

Just as bond statutes created no legal duties *ex proprio vigore,* they also did not limit the legal duties that could be the subject of redress at common law. As the court noted in *Pass v. Dibrell,* 16 Tenn. (8 Yerg.) 470, 473 (1835), an action against the clerk's bond was held not to "supercede, or impair the force of the common law remedy by an action on the case." This Court has also recognized that the existence of a bond statute did not abrogate the common law right of action in assumpsit against a treasurer. *Walton v. United*

States, 22 U.S. (9 Wheat) 651 (1824). *Accord, Cole County v. Dallmeyer,* 101 Mo. 57, 13 S.W. 687 (1890). Even *Crocker v. Fales,* 13 Mass. 259 (1816), relied upon by petitioner, Pet. Br. 20, found that where the bond did not cover acts for which a clerk could be liable, the proper remedy was against the clerk personally.

In sum, if the facts of this case had been presented to a court in 1871, the petitioner would have been accorded no immunity whatever, much less the absolute one he claims. The result would have been the same even if petitioner had been able to show that he exercised wide discretion in implementing or devising procedures for the transmittal of arrest warrant recall orders to the police. Since nineteenth century courts would have deemed his duty in this regard to be purely ministerial, petitioner's failure properly to perform that duty would have been sufficient to render him liable, even if such failure resulted merely from "[a] mistake as to his duty" and in spite of his "honest intentions." *Amy v. The Supervisors,* 78 U.S. 136, 138 (1870). Petitioner's claim of absolute immunity may therefore prevail only if this Court should decide this case without regard to the firmly established nineteenth century common law rules of official liability, which Congress is presumed to have recognized in enacting the predecessor of §1983.

This Court should not deviate, however, from its past insistence that questions of immunity under §1983 be determined through construction of congressional intent. Fundamental principles of the separation of powers require fidelity to congressional intent in determining the reach of a statute. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 194 (1978). *See also United States v. Richardson,* 418 U.S. 166, 188 (1973) (Powell, J., concurring). Moreover, since Congress has specified particular standards of official

immunity for civil rights violations when it has deemed such specification appropriate[10], and is even now considering bills to specify such standards under §1983,[11] it would be particularly inappropriate to decide the immunity question here without regard to legislative intent. In this case, fidelity to that intent requires rejection of petitioner's claim to any immunity for his exercise of ministerial duties, for as shown above, in 1871 there was no common law equivalent to immunity for court clerks who failed to perform such duties and, as shown in Part III below, the rationale for such an immunity is inconsistent with the purposes underlying §1983.

III.

THE POLICY REASONS UNDERLYING THIS COURT'S IMMUNITY DECISIONS WEIGH HEAVILY AGAINST PETITIONER'S CLAIM OF IMMUNITY.

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[10]The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351. tit. III, §802, 82 Stat. 223 (1968) was amended in 1970 to provide: "A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action action brought under this chapter or under any other law." 18 U.S.C. §2520 (1976).

[11]Pending before the Congress are S. 585, 97th Cong., 1st Sess. (1981), and H.R. 4616, 97th Cong., 1st Sess. (1981), which would amend §1983 to provide: "No civil action may be brought against a political subdivision of a state under this section if the political subdivision acted in good faith with a reasonable belief that the actions of the political subdivisions were not in violation of any rights, privileges, or immunities secured by the Constitution or by laws providing for equal rights of citizens or persons."

A. Petitioner Deserves No Immunity Whatever For His Improper Performance Of Ministerial Duties.

This Court has never determined in a §1983 case the applicability of the common law rule denying any immunity from damages to officials who cause injury through violating their ministerial duties.[12] The necessary application of such rule derives, however, not only from the aforesaid considerations of congressional intent, but also from this Court's recent immunity decisions, which demonstrate that the central purpose of immunity in §1983 cases is to protect officials' ability to exercise judgment and discretion. For example, in *Wood v. Strickland*, 420 U.S. 308 (1975), this Court found that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner...." *Id.* at 320. Protecting the exercise of discretion

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[12]Dissenting in *Procunier v. Navarette*, 434 U.S. 555 (1978), Justice Stevens noted that, although the scope of their duties was not clear, certain of the defendant prison officials, who were granted a qualified immunity, may have been performing ministerial chores. *Id.* at 569 n.3. This Court apparently based its opinion, however, upon the assumption that, since plaintiff-respondent had conceded the officials' entitlement to a qualified immunity, the question of that entitlement was not a contested issue in the case. *Id.* at 560-61. That the Court in *Procunier* did not intend to expand *sub silentio* the scope of the qualified immunity defense to include the performance of ministerial duties also seems apparent from its finding that such defense is supported by Courts of Appeals that "have generally accorded prison and jail administrators *performing discretionary functions* a qualified immunity from monetary liability under §1983." *Id.* at 561 n.7 (emphasis added). *See Downs v. Sawtelle*, 574 F.2d 1, 14n. 19 (1st Cir. 1978), *cert denied*, 439 U.S. 910 (1978) (*Procunier v. Navarette* deemed not inconsistent with possibility that on remand state social workers will be found not entitled to assert a qualified immunity in a §1983 action.).

was also the basis for the Court's award of a qualified immunity, which was deemed necessary because the function of school board members, like that of legislators and adjudicators, "necessarily involves the exercise of discretion, the weighing of many factors, and the formulating of long-term policy." *Id.* at 319 (footnote omitted). *See also Butz v. Economou,* 438 U.S. 478, 507 (1978); *Scheuer v. Rhodes,* 416 U.S. 232, 247, 250 (1974). Without an absolute or qualified immunity for officials who exercise substantial judgment or discretion on matter of public interest, this Court has concluded, there would be too great a danger that such officials would skew their decisions towards minimizing their risk of personal liability rather than towards advancing the public interest. *Owen v. City of Independence,* 445 U.S. 622, 655-56 (1980); *Imbler v. Pachtman,* 424 U.S. 409, 423-25 (1976).

Where, as here, an official has no choice as to the proper course of action demanded by the public interest because his duty is ministerial, the fear of suit would only enhance his motivation to comply with his designated duty since such compliance would serve to protect him from liability for violating constitutional rights.[13] Thus, whereas the compensatory and deterrent purposes of §1983 must be mediated by a greater or lesser degree of immunity in

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[13]An official sued for violating constitutional rights in the course of properly discharging his ministerial duties could assert a derivative immunity where he acted pursuant to the valid orders of immune superiors, and possibly could assert a qualified immunity where his reliance on an invalid ministerial order or statutory mandate was reasonable. *See* Sowle, *Qualified Immunity In Section 1983 Cases: The Unresolved Issues of the Conditions for Its Use and the Burden of Persuasion,* 55 Tulane L. Rev. 326, 365-383 (1981). *See also Williams v. Wood,* 612 F.2d 982, 985 (5th Cir. 1980).

situations where the public interest demands substantial freedom of action by officials, no such interest is served by immunizing officials who improperly execute ministerial duties. Rather, the public's interest in assuring its officials' faithful execution of clear legal mandates is consistent with the compensatory and deterrent purposes of §1983. *See Dalton v. Hysell,* 381 N.E.2d 955, 956 (Ohio App. 1978) ("In this case. . .the fact that the Clerk of Courts is subject to possible civil liability tends to encourage proper performance of a statutorily prescribed ministerial duty rather than discouraging same; hence, a public policy argument does not support immunity.") *See* Sowle, *supra* note 13 at 383-93.

The factual record in this case does not support petitioner's claim that the public's need to promote his free exercise of discretion requires that he be given any degree of immunity from §1983 damages. As noted above, pp. 7-8, petitioner's liability may ultimately be predicated upon his deputies' failure to transmit the judge's warrant recall order to the police or upon his own failure to implement properly the established procedures required for the transmittal of such orders. With respect to either failure petitioner may not claim the protection that absolute or qualified immunity affords to officials exercising substantial discretion since such actions are far on the ministerial side of the spectrum of official action. The objective of transmitting arrest warrant recall orders to the police is simple and clear; since the procedues for accomplishing this have already been established, petitioner had no significant choice as to what his proper course of action must be in order to reach that objective. *See, e.g., Johnston v. District of Columbia,* 118 U.S. 19, 20-21 (1886). *See also Johnson v. State,* 69 Cal. 2d 782, 794, 447 P.2d 352, 360 (1968) (rationale for immunity

applies at the "planning," but not the "operational" level of decision-making). Giving petitioner any degree of immunity from suit for constitutional deprivations caused by his improper performance of these ministerial duties would only retard the public's interest in assuring that judges' orders recalling arrest warrants are transmitted to the police.

Petitioner implies that withholding immunity would be unfair as well as administratively inefficient. Pet. Br. 31. Fairness, however, does not lie in making the innocent victim bear the loss of an injury inflicted by one whose actions are not only heedless, but are also unlawful. "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Independence,* 445 U.S. 622, 654 (1980). Furthermore, according to fundamental premises of the common law, sanctions for the infliction of injuries whether by accident or design will tend to decrease the occurrence of such injuries. *See Carlson v. Green,* 446 U.S. 14, 21 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect"). Indeed, petitioner apparently shared this notion when he advised his clerks that failure to follow the correct procedure for processing motions to recall warrants may expose them to liability for civil rights violations under § 1983. J.A. at 20.

It has, however, been observed that "[a] public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability." *Procunier v. Navarette,* 434 U.S. 555, 569 (1978) (Stevens, J. dissenting). Were it clear that ministerial officials who "carelessly disregarded the standards which their superiors directed them to follow. . .would be unable to make the threshold showing necessary to establish good faith," *id.* at 572, the availability of a qualified immunity for ministerial officials who improperly perform their duties

would make little difference since the violation of their ministerial duty would always be a violation of their immunity. However, a good faith immunity might also protect officials who negligently violate constitutional norms whenever those norms are not clearly established. *See Procunier v. Navarette*, 434 U.S. 555, 562-63 (1978). A good faith immunity under such circumstances is justified with respect to officials who must exercise considerable judgment or discretion since society requires that they not feel compelled to decide what is in the public interest by "predicting the future course of constitutional law."[14] *Wood v. Strickland*, 420 U.S. 308, 322 (1975), quoting *Pierson v. Ray*, 386 U.S. 547, 557 (1967). With respect to officials performing ministerial duties, however, a qualified immunity is inappropriate since the public's interest is in encouraging their performance of those duties, not in encouraging their exercise of discretion in determining what the public interest is.

B. No Policy Reasons Justify Granting Petitioner An Absolute Immunity For Any Of His Alleged Unconstitutional Actions.

1. Absolute Immunity Is Not Required For The Adequate Performance Of Court Clerks' Duties.

Even if petitioner could eventually demonstrate that his substantial exercise of discretion in devising a transmittal system for warrant recall orders requires a qualified

[14]But see Sowle, supra note 13 at 344-48 ("Because 'the question of whether the officer acted reasonably is actually one of whether he was negligent,' this privilege [qualified good faith immunity] is inapplicable in a negligence action. The reasonableness prong of the privilege is subsumed in the negligence action. . . .") (Footnote omitted).

immunity from damages, he could not substantiate his claim to an absolute immunity.[15] A court administrator who formulates a procedural system for his subordinates to follow cannot reasonably claim a need for an immunity that is greater than that required by a governor who must act swiftly and firmly to restore order in a state of civil disorder. *Scheuer v. Rhodes,* 416 U.S. 232, 246 (1974). To give the Clerk's procedural formulations " 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreveiwable through the judicial power of the Federal Government,' " *Scheuer v. Rhodes,* 416 U.S. at 248 (quoting *Sterling v. Constantin,* 287 U.S. 378, 397 (1932)), would not only drain §1983 of meaning, *id.*, but would elevate clerks of courts to a status in the law unique among governmental administrators.

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[15]The record, however, is insufficient to support a finding that petitioner is entitled to assert a qualified immunity defense. Not only may petitioner's duties have been ministerial in nature, but he also may not have exercised the discretion that his duties might have authorized. Since the purpose of qualified immunity is to protect officials' freedom to exercise discretion in the public interest, *see supra* at pp. 24-25, an official who fails to exercise such discretion should not be entitled to immunity even if he can show that he reasonably did not know his actions would violate clearly established constitutional rights. *See Johnson v. State,* 69 Cal.2d 782, 794-95 n.8, 447 P.2d 352, 361 n.8 (1968) (official who normally engages in discretionary activity is not entitled to immunity unless he demonstrates that "a policy decision, consciously balancing risks and advantages took place."). Just as Congress in excepting discretionary functions from liability under the Federal Tort Claims Act, 28 U.S.C. §2680(a) and the Administrative Procedure Act, 5 U.S.C. §701(a)(2) has not automatically immunized all actions of officials whose duties involve the exercise of discretion, so Congress in providing a strong deterrent and compensatory remedy under §1983 should not be deemed to have provided an automatic immunity defense for all officials whose duties similarly involve the exercise of discretion.

Petitioner, however, argues for such a status on the paradoxical grounds that absolute immunity is necessary, on the one hand, because it "will shield petitioner when he aids the judge he serves by devising procedures best suited, in the petitioner's judgment, to implement judicial orders. . . ," Pet. Br. 31, and on the other hand, because his "notification of warrant recall orders was clearly performance of a quasi-judicial function required by court order. . . ." *Id.* at 30. If petitioner wishes to claim the absolute immunity a clerk derives from his faithful execution of a valid court order, he cannot also claim that he deserves such immunity because he acts as an administrator who exercises independent judgment. Significantly, petitioner on the facts of this case is unable to rely on either argument as an independent ground for absolute immunity. On the one hand, the failure to execute the court's warrant recall order deprives him of the absolute immunity that a ministerial official derives only from acting *pursuant to* judicial order. On the other hand, petitioner's formulation of procedures for transmitting the recall orders justifies at most the qualified immunity that is afforded administrators who exercise judgment or discretion.

The only escape from this paradox would be if this Court were to hold that absolute immunity protects all court functionaries, regardless of the nature of their functions or the consistency of their actions with court mandates. However, as noted above, *supra* p. 5, the actions of congressional functionaries that are necessary to the conduct of congressional business do not warrant absolute immunity, even in the face of the separation of powers doctrine and the Speech or Debate Clause of the Constitution. For the same reasons, giving blanket immunity to court

functionaries cannot be justified simply because their duties when properly carried out are important to the conduct of court business.

Petitioner's argument that clerks require absolute immunity because their function is essential to the judicial process is also a non sequitur because the undeniable necessity of their function has no bearing on whether absolute immunity is needed for that function's adequate performance. *See McCray v. Maryland,* 456 F.2d 1, 3 (4th Cir. 1972). Indeed, if the fact that clerks are essential to courts has any relevance in this case, it is to emphasize the importance of maintaining the deterrent effect of the § 1983 damage remedy in order to reduce the danger that a clerk's inattentive or wilful exercise of his critical powers will paralyze the entire judicial process.

Even if it were posited that the possibility of a § 1983 suit would have some negative influence on clerks' performance of their duties, this Court's observation as to the nature of such influence on federal prison officials is equally true with respect to court clerks: "even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them. . . [cite]. . .provides adequate protection." *Carlson v. Green,* 446 U.S. 14, 19 (1980). Petitioner has presented no evidence whatever to meet his burden of establishing that a qualified immunity would not also adequately protect his ability, or the ability of court clerks in general, to exercise whatever discretion may be needed to perform their official duties in the public interest.

In denying absolute immunity to a federally appointed defense counsel sued in a state malpractice action, this Court noted that empirical data was necessary to support the defender's "not implausible" argument for his practical need

for such immunity. Without such evidence the Court was "unwilling to ascribe to Congress an intent to accord an immunity. . .in the face of the silent legislative history on this point." *Ferri v. Ackerman,* 444 U.S. 193, 200-01 n.17 (1979). As in *Ferri,* petitioner's practical argument for absolute immunity is without evidentiary support, but, unlike in *Ferri,* the argument here is implausible as well.

Petitioner's sole contention in this regard is that without absolute immunity from suit court clerks "will have no incentive to make decisions or suggestions to judges to promote the efficient administration of the judicial system." Pet. Br. 30. Petitioner acknowledges, however, that it is the duty of court clerks to promote the proper performance of judicial duties. Pet. Br. 9, 14. The fear of liability under §1983 would override court clerks' normal incentive to perform such duties only if that fear would cause them to act in ways contrary to "the efficient administration of the judicial system." As exemplified here, however, efficient judicial administration and the protection of constitutional rights are normally consistent objectives. The potential for liability under §1983 could therefore be expected only to reinforce a clerk's duty to promote efficient judicial administration. Even if the petitioner could hypothesize an actual conflict between the fear of §1983 liability and court clerks' incentive to fulfill that duty, such fulfillment would not require the elimination of any possibility of suit under §1983.

To the extent that petitioner argues, however, that absolute immunity is necessary to enable court clerks to go beyond their legal duties to improve the judicial system, his argument lacks not only empirical support and inherent plausibility, but also relevance to the issues here. There is no dispute in this case that petitioner had a legal duty to

implement procedures to assure that arrest warrant recall orders are delivered to the police. Pet. Br. 15. Moreover, it would be extraordinary if petitioner or any court clerk felt constrained by the fear of liability from offering "suggestions to judges to promote the efficient administration of the judicial system." Pet. Br. 30. Such "suggestions" would normally not be sufficient to cause constitutional violations, and even where they might be sufficient, clerks would not be liable unless they knew or should have known that their suggestions would result in the violation of clearly established constitutional rights.

Petitioner also argues, although without support in the record, that absolute immunity is necessary because of the likelihood that errors will occur in courts with over-crowded criminal dockets. Pet. Br. 11, 30. However, as this Court noted in *Butz v. Economou*, 438 U.S. 47, 516 n.40 (1978), the fact that officials "act under 'serious constraints of time and even information' " is not central to the determination of the need for absolute immunity "for the same might be said of a wide variety of state and federal officials who enjoy only qualified immunity." Moreover, because petitioner's challenged conduct in this case may also have an effect on the "thousands of other warrant recall orders issued by the Circuit Court and implemented by the petitioner's deputies," Pet. Br. 15, absolute immunity from damages is particularly inappropriate. Section 1983 has an especially beneficial role in encouraging constitutional behavior by officials whose enormous bureaucratic powers affect multitudes of people. *See Owen v. City of Independence*, 445 U.S. 622, 648 (1980); *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 266, 564 P.2d 1227, 1233 (1977) ("In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous").

2. The Duties Of Court Clerks Are Not Functionally Comparable To Those Of Judges In Deciding Cases.

The grant of absolute immunity has also been justified for actors in the judicial or adjudicatory process other than judges because of the "functional comparability of their judgments to those of the judge...." *Butz v. Economou,* 438 U.S. 478, 512, *quoting Imbler v. Pachtman,* 424 U.S. 409, 423 n.20 (1976). Even if petitioner's actionable conduct is determined to be discretionary rather than ministerial in nature, it cannot seriously be contended, and significantly, petitioner does not contend, that his administrative judgments are functionally comparable to the adjudicative judgments of judges.[16]

Court clerks' ministerial and administrative activities also do not share three special characteristics of judicial and judicial-type processes that have heretofore justified the grant of absolute immunity. First, court clerks' actions do not normally entail a risk that losing parties will seek relitigation of the merits of their claim by charging the clerk in the first adjudication with unconstitutional animus. *See Butz v. Economou,* 438 U.S. 478, 512 (1978). A losing party would not be likely to sue a clerk to achieve this end since the clerk did not participate in, and therefore could not be held responsible for, rendering the unfavorable ruling. To the extent that a losing litigant were to attempt to

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[16]*See Dalehite v. United States,* 346 U.S. 15, 34 (1953) (distinguishing between the discretion of a judge, which is "a power to decide within the limits of positive rules of law subject to judicial review," and the discretion of an executive or administrator, which is "to act according to one's judgment of the best course"). *See also Sellars v. Procunier,* 641 F.2d 1295, 1300-01 (9th Cir. 1981).

circumvent the judge's absolute immunity by suing the clerk for his enforcement of the judge's ruling, the clerk would enjoy an absolute derivative immunity. *See Williams v. Wood,* 612 F.2d 982, 985 (1980). As explained below, the overwhelming majority of cases petitioner cites in support of absolute immunity are those in which the clerk had such a derivative immunity for carrying out mandatory judicial orders. *Infra* pp. 39-50.

Second, while a judge who decides "controversial cases that arouse the most intense feeling in the litigants. . .should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption," *Pierson v. Ray,* 386 U.S. 547, 554 (1967), *Imbler v. Pachtman,* 424 U.S. 409, 435 (1978), a court clerk is normally not subject to such fears. Although any official who does not comply with a citizen's wishes may also engender intense feelings of hostility, there is no reason to believe that a court clerk, unlike a judge or prosecutor, would run any unusual risk in this regard, since the clerk neither decides to prosecute nor resolves the merits of a controversy against anyone. Moreover, since policemen, the officials in our society whose duties are most likely to generate citizen resentment, are sufficiently protected by a qualified immunity, *Pierson v. Ray,* 386 U.S. 547, 557 (1967), court clerks cannot require any greater protection.

Finally, absolute immunity has been justified for actors in judicial or judicial-type processes because of the presence of "safeguards built into the judicial process [that] tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." *Butz v. Economou,* 438 U.S. 478, 512 (1978). Such safeguards have no analogue either in the process by which petitioner allegedly violated respondent's constitutional rights or in the pro-

cedures followed by clerks generally. Not one of the procedural safeguards found in *Butz v. Economou*, 438 U.S. at 513-14, to be essential to the absolute immunity of federal prosecutorial and fact-finding officials was available in this case in order to enable respondent to assure that the judge's order recalling her warrant was transmitted to the police.

The impossibility of providing procedural safeguards against a court clerk's negligent or wilful failure either to transmit arrest warrant recalls to the police or to create procedures to ensure their transmittal makes clear the utter inappropriateness of absolute immunity in the context of informal, non-adversarial official action. Without the possibility of either § 1983 damage actions or alternative safeguards to prevent constitutional deprivations, individuals have no recourse where particular officials are not timid about violating constitutional rights. *See Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 260-66, 564 P.2d 1227, 1232-33 (1977). In recognition of this danger, this Court has never freed officials from the threat of damage actions where there is no assurance either in the nature of their tenure and responsibilities, *e.g.*, *Stump v. Sparkman*, 435 U.S. 349 (1978), or in the process by which they act, *e.g.*, *Pierson v. Ray*, 386 U.S. 547, 554 (1967), that individuals will have protection from their unconstitutional actions.[17]

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[17]The logic of petitioner's theory requires extension of absolute immunity to all court functionaries, including, for example, a bailiff who wilfully brutalizes a courtroom spectator under his general authority to keep order in the court, a court reporter who chooses not to prepare a transcript for appeal, a sheriff who serves a writ by leaving it in the sewer or a clerk who enters an order contrary to the judge's directions, thereby causing irreversible injury, such as the traumatic strip search here. J.A.

(continued)

3. No Alternative Remedies To A §1983 Damage Action Justify The Grant Of Absolute Immunity to Petitioner.

Petitioner argues that the possibility of criminal conviction of clerks and of actions on the clerk's $5,000.00 statutory bond raises "the fundamental question. . .as to the overall necessity for allowing a §1983 suit as a remedy." Pet. Br. 32. It is well settled, however, that a plaintiff may invoke §1983 even where officials' unconstitutional acts are in violation of and redressable under state law. *Monroe v. Pape,* 365 U.S. 167, 183 (1961).

Furthermore, petitioner does not show how criminal remedies reduce the need for §1983 suits where a clerk's unconstitutional conduct is neither wilful under the requirements of 18 U.S.C. §242 nor in violation of the specific prohibitions of the state criminal law. In light of the paucity of reported cases under these provisions, it is also significant that petitioner cites no evidence to show that they provide anything more than a purely theoretical alternative to the deterrent functions of §1983. *Cf. Ferri v. Ackerman,* 444 U.S. 193, 205 (1979) (where question of whether immunity is warranted depends upon empirical data, the question can most appropriately be answered by Congress). Furthermore, petitioner's own reliance on the threat of §1983

(footnote continued from preceding page)

7, 9. Neither the process by which any of these court functionaries acts nor the nature of their offices give assurance that constitutional rights will be protected. *See Butz v. Economou,* 483 U.S. 478, 512-13 (1978). *See also Grimm v. Arizona Board of Pardons and Paroles,* 115 Ariz. 260, 264, 564 P.2d 1227, 1231 (1977) ("The discretion of an administrative official is not that of a judge. By training and tradition, the trust placed in the judgment of a judge is not the same as that of an administrative officer.")

damage suits in order to assure his deputies' compliance with the procedures for recalling arrest warrants, J.A. at 20, shows that at one time such suits were the most effective deterrent that even he could think of in order to prevent the very harm suffered by respondent.

Petitioner's reference to a clerk's statutorily required bond as a sufficient alternative to §1983 liability, Pet. Br. 33, is similarly a make-weight argument. Such bonds, where they happen to exist, are wholly inadequate to safeguard constitutional rights. The minimum $5,000.00 amount of the bond under Illinois' "representative" bond statute, Pet. Br. 19, may be wholly inadequate compensation; the People, rather than the aggrieved individual, must bring the action on a bond such as petitioner's, *Hicks v. Aetna Insurance Co.*, 97 Ill. App.3d 828, 423 N.E.2d 584, 586 (1981); and the standards for recovery are vague, and probably exclude recovery for bad faith constitutional violations where the clerk nevertheless acts in conformance with his official duties.

Finally, in light of the variations in the degree of protection for the constitutionally aggrieved afforded by bond statutes among the states, it would be inappropriate to devise a federal law of immunity under §1983 in reliance upon the chance of a remedy under such a statute.[18] *See Martinez v. California*, 444 U.S. 277, 284 (1980) (state immunity statute does not control claim under §1983).

In sum, the public policy reasons that have heretofore justified absolute immunity do not override or even conflict

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[18]Some states exclude any recovery in favor of individuals under their bond statutes. *See, e.g., State ex rel Abdiehl v. Sriver*, 210 Ind. 129, 1 N.E.2d 579 (1936), *Graton v. City of Cambridge*, 259 Mass. 310, 156 N.E. 431 (1927); *Martin v. Magee*, 179 La. 913, 155 So. 433 (1934); *Ward v. Johnson*, 72 Ariz. 213, 232 P.2d 960 (1951).

in this case with the purposes of §1983 of providing compensation for and deterrence of constitutional violations. It is noteworthy that this Court has never decided a case in which the policy reasons for absolute immunity have been deemed to conflict with Congress' intent in enacting §1983. Although this Court's prior understandings of the limits of its role in statutory construction indicate that a choice between policy and congressional intent must be made in favor of the latter, the Court is saved from such choice in this case since policy and intent are congruent in requiring rejection of petitioner's claimed entitlement to absolute immunity.

IV.

MODERN FEDERAL AND STATE CASE LAW CONTRADICTS PETITIONER'S CLAIM OF SUBSTANTIAL PRECEDENT SUPPORTING A GENERAL RULE OF ABSOLUTE IMMUNITY FOR COURT CLERKS.

Petitioner claims the support of a body of modern federal circuit court and state common law precedent that is in fact overwhelmingly contrary to his position. He accomplishes this inversion of the weight of authority through two pervasive errors in case analysis. First, petitioner claims the support of cases that have been overruled or rendered unauthoritative by later cases in the same circuit, many of which he ignores. Second, he cites as controlling authority cases that support absolute immunity for clerks who are alleged to have fulfilled the duties required of them by court order, rule or statute. Such cases are inconclusive as to the

issue here of whether court clerks who fail to fulfill their mandated duties are immune. It is also significant that the majority of cases petitioner claims in support of absolute immunity were written prior to this Court's elaboration of the criteria for such immunity in cases extending from *Scheuer v. Rhodes,* 416 U.S. 232 (1974), through *Dennis v. Sparks,* 449 U.S. 24 (1980).

The two Eighth Circuit cases petitioner cites, *Davis v. McAteer,* 431 F.2d 81 (8th Cir. 1970), and *Rhodes v. Houston,* 202 F. Supp. 624 (D. Neb. 1962), *aff'd,* 309 F.2d 959 (8th Cir. 1962), *cert denied,* 372 U.S. 909 (1963), Pet. Br. 13, 28, no longer represent the position of that Circuit. In *McLallen v. Henderson,* 492 F.2d 1298, 1300 (8th Cir. 1974), the court rejected the rationale of the two prior cases in finding that "court functionaries such as clerks are not clothed in judicial immunity because their duties are ministerial, not discretionary in nature." *See also Barnes v. Dorsey,* 480 F.2d 1057, 1060 (8th Cir. 1973); *Norwood v. Solomon,* 431 F. Supp. 380, 382 (E.D. Mo. 1977), *aff'd mem.* 566 F.2d 179 (8th Cir. 1977) ("[judicial] immunity will not be granted where the action complained of is ministerial").

Petitioner similarly mischaracterizes the position of the Tenth Circuit by citing only *Hamrick v. Norton,* 322 F. Supp. 424 (D. Kan. 1970), *aff'd,* 436 F.2d 940 (10th Cir. 1971), which, after finding no constitutional violation, made a perfunctory reference to the existence of authorities that had granted court clerks immunity "for acts done in performance of their official duties." 322 F. Supp. at 426. Petitioner does not mention, however, *Henricksen v. Bentley,* 644 F.2d 852 (10th Cir. 1981), in which the Tenth Circuit recently concluded after canvassing the cases from other jurisdictions that absolute immunity is warranted for

court clerks only under extraordinary circumstances, and that "the courts which have considered the question have concluded that clerks are generally entitled to qualified immunity." *Id.* at 586. In reversing the dismissal of a § 1983 suit against a court clerk alleged to have interfered with the filing of a post-conviction review petition, the court in *Henricksen* noted that the clerk "has or may have a defense based on qualified immunity." *Id.*[19]

Petitioner's reliance on *Zimmerman v. Spears,* 428 F. Supp. 759 (W.D. Tex. 1977), *aff'd on other grounds,* 565 F.2d 310 (5th Cir. 1977), Pet. Br. 27, is also misplaced in light of the Fifth Circuit's subsequent, decisive rejection in *Williams v. Wood,* 612 F.2d 982 (5th Cir. 1980), of a general rule of absolute immunity for court clerks:

> A clerk of a federal court performing routine duties such as entering an order and notifying parties does not enjoy an absolute immunity from damages actions for injuries caused by that conduct. . . . Absolute immunity from damages actions applies only in a narrow range of actions for clerks of courts acting in a nonroutine manner under command of court decrees or under explicit instructions of a judge.

Id. at 984-85. *See also Tarter v. Hury,* 646 F.2d 1010, 1013 (5th Cir. 1981).

Petitioner's reliance on Third Circuit authority, Pet. Br. 26-27, is unpersuasive for two reasons. First, in both

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[19]The Tenth Circuit's most recent decision on court clerk immunity, *Wiggins v. New Mexico State Supreme Court Clerk,* 664 F.2d 812 (10th Cir. 1981), does not alter the Circuit's position stated in *Henricksen,* since *Wiggins* followed the general rule of absolute immunity for court clerks sued for obeying a court order. In *Wiggins,* the Clerk of the State Supreme Court had been sued for not granting plaintiff's writ of habeas corpus, which, as the Circuit Court found, was an act only courts were empowered to do. *Id.* at 815.

Lockhart v. Hoenstine, 411 F.2d 455 (3rd Cir. 1969) and *Ginsburg v. Stern,* 125 F.Supp. 596 (W.D. Pa. 1955), *aff'd,* 225 F.2d 245 (3rd Cir. 1955), the court clerks were sued for actions they took at the express direction of judges. As the court stated in *Raitport v. Provident National Bank,* 451 F. Supp. 522, 537 (E.D. Pa. 1978), these two cases "simply recognize a defense - obedience to a direct judicial order - that is '[s]imilar to the defense of proper performance of ministerial duties.' " (Citations omitted).

Petitioner's reliance on *Smith v. Rosenbaum,* 460 F.2d 1019 (3d Cir. 1972), also does not support his claim to the Third Circuit's support since, as the court in *Raitport* also pointed out, in light of this Court's more recent immunity decisions the Third Circuit has "take[n] a significantly more restrictive approach to absolute 'quasi-judicial' immunity than did the earlier decisions [including *Smith v. Rosenbaum*], and in particular they recognized that such immunity ordinarily exends only to officials performing 'quasi-judicial,' *i.e.,* adjudicatory or otherwise judgmental functions." 451 F. Supp. at 537-38. Having thus concluded that the Third Circuit would not now decide the question of a court clerk's immunity on the basis of its pre-*Wood v. Strickland* decisions, but "would approach the issue afresh in light of *Strickland* and *Imbler v. Pachtman,*" the court in *Raitport* held that the defendant clerk "cannot partake of absolute judicial or 'quasi-judicial' immunity." *Id.* at 538. *See also Crews v. Petrosky,* 509 F. Supp. 1199 (W.D. Pa. 1981) (clerk entitled to qualified immunity where duties are ministerial); *Allen v. Dorsey,* 463 F. Supp. 44, 47 (E.D. Pa. 1978) ("Although the Clerk of the Court and his agents have important duties in the judicial process, their duties, such as docketing and filing papers with the court, are ministerial and

mandatory acts which do not merit insulation from liability for damages by a grant of absolute 'quasi-judicial' immunity").

As revealed in petitioner's quotation from *Slotnick v. Garfinkle,* 632 F.2d 163 (1st Cir. 1980), Pet. Br. 26, the First Circuit recognizes absolute immunity for clerks who are sued for "carrying out the official directives of a judge." *Id.* at 166. That the First Circuit would not extend such immunity to clerks not acting in this special role as an "arm of the judge" is evident from its approval of *Williams v. Wood,* 612 F.2d 982 (5th Cir. 1980), which, as noted above, p. 41, found absolute immunity inappropriate in all circumstances except where a clerk acts in a non-routine manner under explicit court direction. *Slotnick v. Garfinkle,* 632 F.2d at 166.

In claiming the support of the Second Circuit, petitioner relies upon a district court's grant of absolute immunity to court clerks who had been sued for implementing a procedure for serving arrest warrants that had been approved by the judges of the Family Court. *Blouin v. Dembitz,* 367 F. Supp. 415 (S.D.N.Y. 1973), *aff'd on other grounds,* 489 F.2d 488 (2nd Cir. 1973). Absolute immunity was deemed necessary so that rules "protecting state judges in the discharge of their functions may not be circumvented or vitiated, by pretending to maintain this suit also against their 'clerks, servants and agents. . . .' " *Id.* at 422. There is no hint in *Blouin* that the court would have granted absolute immunity if the clerks had been sued for *not* implementing the procedures approved by the Family Court judges. Recent district court decisions within the Second Circuit demonstrate that the prevailing rule in that Circuit is to deny absolute immunity to court clerks who fail to perform ministerial duties. *Gutierrez v. Vergari,* 499 F. Supp. 1040,

1047 n.5 (S.D.N.Y. 1980); *Marty's Adult World of New Britain, Inc. v. Guida,* 453 F. Supp. 810, 816 (D.Conn. 1978). In denying absolute immunity for a court clerk's improper docketing of an appeal, the court in *Marty's Adult World* distinguished the cases holding court clerks absolutely immune on the ground that "[t]he court clerks' actions in the previous judicial immunity cases either were performed in the discharge of the clerks' lawful duties, not in neglect or violation of those duties, or were performed in accordance with judicial orders." *Id.* at 817.

The Sixth Circuit in *Denman v. Leedy,* 479 F.2d 1097, 1098 (6th Cir. 1973), did, as petitioner maintains, find a court clerk immune for an act performed "within the scope of his official quasi-judicial duties. . . ." However, the clerk's duty in *Denman* was that of fixing bail, which is functionally comparable to the type of discretionary decision-making for which judges are granted immunity. The case therefore does not support the grant of absolute immunity for court clerks who fail to perform ministerial duties. Moreover, the court in *Denman* did not specify whether the immunity was absolute or qualified. Several courts have construed *Denman* to afford court clerks only a qualified immunity for damages. *Williams v. Wood,* 612 F.2d 982, 985 n.2 (5th Cir. 1980); *Henricksen v. Bentley,* 644 F.2d 852, 855 (10th Cir. 1980); *German v. Killeen,* 495 F. Supp. 822, 831 (E.D. Mich. 1980).

Petitioner's claim that the Seventh Circuit's ruling here conflicts with its own precedent again fails to recognize that cases granting immunity for a clerk's proper performance of mandated ministerial duties are not inconsistent with cases such as this one, in which clerks fail to perform their ministerial duties and are therefore not entitled to absolute immunity. In *Panko v. Rodak,* 606 F.2d 168 (7th Cir.

1979), *cert. denied,* 444 U.S. 1081 (1980), the Clerk of the United States Supreme Court and his deputy were held immune from damages because their allegedly wrongful refusal to accept documents for filing was mandated by both Supreme Court Rule and this Court's holding in *Snider v. All State Administrators, Inc.,* 414 U.S. 685 (1974), which required the rejection of filings not in accordance with the Supreme Court Rules. 606 F.2d at 171. Similarly, in *Dieu v. Norton,* 411 F.2d 761, 763 (7th Cir. 1969), the court found that the clerk's allegedly wrongful act of denying a party a copy of a transcript was "in the discharge of [his] official responsibilities." Finally, in *Brown v. Dunne,* 409 F.2d 341 (7th Cir. 1969), the court clerks were deemed to have been carrying out their statutorily mandated duties in issuing summonses and certifying documents. Thus, in all prior Seventh Circuit decisions, and in contrast to this case, the alleged unconstitutional actions of the court clerks were in compliance with their mandated duties.

It is also noteworthy that, as the quotation from *Brown v. Dunne* in Petitioner's Brief at 29 reveals, the Seventh Circuit accepted the rationale of *Ex Parte Virginia,* 100 U.S. 339 (1879), in determining the availability of immunity on the basis of whether an official's acts are of a ministerial or judicial nature. 409 F.2d at 343. Had the court been faced with allegedly unconstitutional acts of court clerks that were as clearly ministerial as petitioner's here, this rationale presumably would have required the denial of the clerk's immunity.

The Ninth Circuit decisions cited by petitioner lend limited support to his claim of absolute immunity. *Morrison v. Jones,* 607 F.2d 1269 (9th Cir. 1979) (per curiam); *Stewart v. Minnick,* 409 F.2d 826 (9th Cir. 1969) (per curiam). In both cases, however, the grant of absolute

immunity was an alternative ground of decision, for which the court offered no rationale and dubious case support. In *Stewart v. Minnick* the complaint against the clerk and court reporter for failing to provide plaintiff with a portion of his criminal trial transcript was held barred by both res judicata and judicial immunity, which protected the clerk's and court reporter's acts "performed in their capacity as quasi-judicial officers." 409 F.2d at 826.

In *Morrison v. Jones* the court found no basis for concluding that the court clerk had caused any injury to the plaintiff, but proceeded to note that at best he might be charged "with some kind of responsibility for [plaintiff's] failure to receive notice of the May 5, 1975, order" and that "[h]is failure, if any, to perform a ministerial duty which was a part of judicial process is also clothed with quasi-judicial immunity." 607 F.2d at 1273. As in *Stewart v. Minnick*, no rationale is given for this broad dictum and the cases cited in its support are equivocal at best.[20]

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[20]*Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973), found that court clerks were protected in their discretionary judicial-type judgments by an immunity that may have been only qualified. *See supra* 44. *Smith v. Rosenbaum*, 460 F.2d 1019 (3rd Cir. 1972), no longer represents the Third Circuit's position on absolute immunity. *See supra* p. 42. *Shuman v. California*, 584 F.2d 868 (9th Cir. 1978) referred only to a state trial judge's immunity for his role in presiding over a mandamus action. Finally, and most importantly, *Gillibeau v. City of Richmond*, 417 F.2d 426 (9th Cir. 1969), actually undercuts petitioner's broad reading of *Morrison's* absolute immunity dictum. The Ninth Circuit in *Gillibeau* denied absolute immunity to court officers because their unconstitutional actions in enforcing a Municipal Court judge's eviction order were not alleged to have been "performed solely at the direction of such a judge." Read in light of *Gillibeau*, *Morrison's* dictum on quasi-judicial immunity may stand only for the proposition that a clerk's failure to perform a ministerial duty is protected as "part of judicial process" when such nonperformance is at the direction of a judge. The facts in *Morrison* do not reveal whether the clerk failed to give notice of the court's order because of the judge's direction.

Most importantly, the Ninth Circuit's detailed analysis of the rationale for granting immunity under § 1983 in *Sellars v. Procunier,* 641 F.2d 1295 (9th Cir. 1981) makes clear that it would not now accept a rule of automatic absolute immunity for court functionaries who fail to perform ministerial duties. In applying the "functional comparability" test of *Butz v. Economou,* 438 U.S. 478 (1978), to the determination of the immunity of parole board members, the court found that state officials who are neither judges nor judge-like are not protected by absolute immunity because they "are not primarily adjudicators of disputes brought before them by advocates who legitimately expect impartial decisions." 641 F.2d at 1301. Since the court believed that *Butz* required it to "look not just to the title of a state or federal official, or to his or her location within the bureaucratic superstructure, but to the official's function as well in determining the question of immunity," *id.* at 1303, the Ninth Circuit would not now conclude that court clerks whose ministerial duties are not functionally equivalent to the adjudicative duties of judges should be granted absolute immunity simply because of their association with the judicial process.

Petitioner does recognize that his theory of absolute immunity is not supported by *McCray v. Maryland,* 456 F.2d 1 (4th Cir. 1972), which held that court clerks not acting in obedience to court order have no immunity from damages for failing to discharge their ministerial duties. Petitioner, however, portrays *McCray's* rejection of a rule of automatic absolute immunity for court clerks as the "minority rule in the Circuits." Pet. Br. 25. As the foregoing analysis of the federal court decisions reveals, however, the preponderance of recent authority in every circuit, except possibly the Ninth Circuit, rejects such a rule. Moreover,

McCray v. Maryland has become the leading case on the subject of court clerk immunity, having been cited with approval by courts in six other Circuits.

State court decisions with strong factual similarities to this case are in accord with the consensus of federal court decisions that absolute immunity does not protect court clerks sued for failure to perform ministerial duties. In *Connell v. Tooele City,* 572 P.2d 697 (Utah 1977), the court found that absolute immunity did not protect a court clerk who negligently caused plaintiff to be arrested twice, once because of the clerk's failure to record properly plaintiff's payment of a fine and once because of the clerk's failure to have plaintiff's arrest warrant recalled. The court found absolute immunity unwarranted because "if the employee's duties require no exercise of judgment or discretion, the reason for protecting his actions does not exist." *Id.* at 699.

In *Mauro v. County of Kittitas,* 26 Wash.App.538, 613 P.2d 195 (1980), the court found that absolute immunity did not protect various officials, including a clerk whose negligent failure to deliver an arrest warrant recall order to the sheriff's office caused plaintiff's arrest. There, as here, "[w]hat happened to the order withdrawing the warrant remains a mystery." *Id.* at 539, 613 P.2d at 196. The court's rationale for rejecting the clerk's claim of immunity applies equally here:

> "The act in this case was not a judicial act because the order had been executed by the judge. It was not a discretionary act but a purely ministerial act of a clerk of either the court or the sheriff's department."

Id. at 540, 613 P.2d at 197.

In *Dalton v. Hysell,* 381 N.E.2d 955 (Ohio App. 1978), the court found that absolute immunity did not protect a

court clerk who caused plaintiff's arrest by negligently failing to record his payment of a traffic fine. The court found no reason to apply judicial immunity for reasons fully applicable here:

> The Clerk was not carrying out a specific order of the court where judicial immunity would protect him from liability for the judicially mandated act. Nor is the instant case one in which discretion is involved where immunity may be granted on a public policy basis that a public official must be permitted freedom to perform his discretionary duties.

Id. at 956 (citations omitted).

Other state court decisions deny court clerks absolute immunity for the failure to perform similar ministerial duties: *Stine v. Shuttle,* 134 Ind.App. 67, 186 N.E.2d 168 (1962) (negligent issuance of an arrest warrant); *State v. Priest,* 152 S.W.2d 109 (Mo. 1941) (failure to issue executions on time); *Maddox v. Astro Investments,* 45 Ohio App.2d 203, 343 N.E.2d 133 (1975) (delay in docketing and indexing a judgment); *Calhoun v. City of Providence,* 390 A.2d 350 (R.I. 1978) (negligent failure to process a recall order of a capias).

The three state court cases petitioner cites offer little support for his theory of absolute immunity. *Yamamoto v. Santa Cruz County Board of Supervisors,* 124 Ariz. 538, 606 P.2d 28 (1980) is inapposite since absolute immunity was granted for a specific act undertaken by a court clerk "pursuant to the order of the superior court judge." *Id.* at 540, 606 P.2d at 30.

In *City of Louisville v. Bergel,* 610 S.W.2d 292 (Ky. 1980), a clerk was granted absolute immunity for her wrongful issuance of an arrest warrant because her duties in this regard were deemed to be "judicial functions." *Id.* at 293. Unlike petitioner's administrative or ministerial

actions here, the issuance of an arrest warrant upon a determination of probable cause is functionally comparable to the actions of judges in deciding cases.[21] Finally, in *Rodriguez v. State*, 55 Misc.2d 669, 285 N.Y.S.2d 896 (N.Y.Ct.Cl. 1967), the New York Court of Claims recognized the principle, denied by petitioner, that court clerks should not have immunity for acts which are ministerial in nature, such as keeping and certifying records. *Id.* at 673-74, 285 N.Y.S.2d at 901-01. However, for unexplained reasons, the court deemed the clerk's action in not notifying prison authorities of the plaintiff's probation termination to be of a quasi-judicial nature.

No state court decision, including *Rodriguez*, accepts the principle that clerks of courts should be absolutely immune for their failure to perform ministerial duties. Furthermore, *Rodriguez* is the only case that on its facts offers any support for the proposition that the delivery of arrest warrant recall orders to the police is a quasi-judicial rather than a ministerial function. In denying absolute immunity to court clerks charged with ministerial misfeasance similar to that alleged here, the great majority of state courts have joined a similar majority of federal courts in rejecting a general rule of absolute immunity for court clerks.

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[21]In finding that the clerk's issuance of a warrant was a judicial function, the court in *Bergel* relied upon *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), in which this Court held that court clerks could constitutionally issue arrest warrants since they have the capacity to make the evaluation of factual data necessary to a determination of probable cause. *Id.* at 351-52.

V.

THE QUESTION OF PETITIONER'S IMMUNITY, WHICH IS THE ONLY QUESTION BEFORE THIS COURT, WAS NOT, AND COULD NOT PROPERLY HAVE BEEN, RESOLVED ON THE BASIS OF PETITIONER'S SUMMARY JUDGMENT MOTION.

Petitioner maintains that the district court correctly granted summary judgment because his uncontradicted affidavits and documents "established the absence of a genuine issue of material fact and that petitioner enjoyed absolute judicial immunity. . . ." Pet. Br. 34. Since the district court did not address the issue of absolute immunity, Cert. Pet. 19a, which was raised in neither petitioner's summary judgment motion nor his supporting evidence, J.A. 15-24, petitioner's reliance on the rationale of the District Court's decision as a justification for his absolute immunity is illogical.

In supporting the District Court's grant of summary judgment petitioner appears to suggest that the evidence conclusively established the constitutionality of his conduct. Pet. Br. 35. Elsewhere, petitioner suggests the insufficiency of the Complaint's allegations of his unconstitutional conduct. Pet. Br. 25. Because these questions go to the merits of respondent's case, they are neither logically nor factually related to the Question Presented of petitioner's absolute immunity. The grant of such immunity defeats an action at the outset in order that an official need not defend the constitutionality of his conduct. *Tenney v. Brandhove,* 341 U.S. 367, 377 (1951); *Hampton v. City of Chicago,* 484 F.2d 602, 607 (7th Cir. 1973) (per Stevens, J.).

Petitioner's queries as to the merits of respondent's case cannot therefore appropriately be addressed until this Court resolves the Question Presented. Although respondent naturally disagrees with petitioner's suggestions that her underlying claim lacks merit, respondent has limited this Brief to the Question Presented, both because petitioner has not asked this Court to decide questions relating to the merits and because he could not properly do so under Supreme Court Rules 21(1) (a) and 34(1) (a).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the decision of the Seventh Circuit Court of Appeals be affirmed and that petitioner's request for a holding that he is entitled to absolute immunity be denied.

Respectfully submitted,

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